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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 PETER ALLEN, *on behalf of*  
4 *themselves and others*  
*similarly situated, et al.,*  
Plaintiffs,

5 v.

19 CV 08173 (LAP)

6 CARL KOENIGSMANN, MD, *et al.,*  
7 Defendants.

8 -----x

9 New York, N.Y.  
May 9, 2023  
12:10 p.m.

10 Before:

11 HON. LORETTA A. PRESKA,

12 District Judge

13 APPEARANCES

14 LAW OFFICE OF AMY JANE AGNEW  
15 Attorneys for Class Plaintiffs  
16 BY: AMY JANE AGNEW  
JOSHUA LEE MORRISON

17 WHITEMAN OSTERMAN & HANNA  
Attorney for Defendant Moores  
18 BY: ORIANA KILEY

19 CONWAY, DONOVAN & MANLEY PLLC  
Attorney for Defendants Andola, Gusman, Lee, Mantaro,  
20 Karandy, Acrish, Ashong, Braselmann  
21 BY: RYAN E. MANLEY

22 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
Attorneys for Defendants Koenigsmann, Mueller, Dinello,  
Hammer, Salotti  
23 BY: MICHAEL J. KEANE  
DANIEL SHULZE  
24 IAN RAMAGE

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1 THE COURT: For plaintiff, please.

2 MS. AGNEW: Good afternoon, your Honor.

3 Amy Jane Agnew for plaintiff class, Law Office of

4 Amy Jane Agnew.

5 MR. MORRISON: And Josh Morrison.

6 THE COURT: Good morning.

7 For defense.

8 MS. KILEY: Good morning, your Honor.

9 Oriana Kiley on behalf of Dr. Moores in an official  
10 capacity.

11 MR. MANLEY: Good morning, your Honor.

12 Ryan Manley from Conway Donovan & Manley on behalf of  
13 the non-state representative defendants.

14 THE COURT: Mr. Manley.

15 MR. KEANE: Good afternoon, your Honor.

16 Michael Keane from the Office of the

17 Attorney General --

18 THE COURT: Yes, sir. Good afternoon.

19 MR. KEANE: -- for the CMOs.

20 MR. SCHULZE: Daniel Schulze, also for the  
21 state-represented defendants.

22 THE COURT: Good afternoon, Mr. Shulze.

23 MR. RAMAGE: And Ian Ramage --

24 THE COURT: Good afternoon.

25 How would you like to proceed, counsel? How are going

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1 to get the language of the preliminary injunction, please?

2 And, Ms. Kiley, let me just say this: In my view, the  
3 order which you folks sent in with your May 4 letter is really  
4 bordering on bad faith, that in your view, the only order would  
5 be that the state medical providers provide pain treatment to  
6 the mentioned individuals is really quite ridiculous. So it  
7 was not a very helpful proposed order. So I ask again, how are  
8 we going to get the language of a preliminary injunction?

9 And I will point you folks to the language in the  
10 second amended complaint that is quoted at the top of Page 4 of  
11 the Court's opinion and order at Docket Number 552. And that  
12 recounts the equitable relief that plaintiffs were seeking and  
13 are seeking in the second amended complaint.

14 So how are we going to get this written down, counsel?

15 MS. KILEY: Your Honor. Sorry. May I be heard?

16 THE COURT: Yes.

17 MS. KILEY: The order that follows the details of the  
18 findings of the Court for each of the seven witnesses who  
19 testified was written because we took all the findings and  
20 analyzed the conclusions made by the Court with respect to the  
21 analysis' unlikelihood of success on the merits, which the  
22 Court found that there was failure across several DOCCS  
23 facilities that medical providers are not prescribing pain  
24 medication reasonably. So that was what formed the basis of  
25 the language that we have in there.

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1           We understand that throughout this litigation, that my  
2 adversary has been advocating for what is referred to as  
3 individualized assessments and monitoring.

4           During a meet-and-confer, I asked my adversary if we  
5 can carve out some time to discuss what those terms actually  
6 mean, to which the response was no. I turned to my client,  
7 Dr. Moores, to ask what is an individualized assessment with  
8 respect to chronic pain, and Dr. Moores explained that it's  
9 actually not something that's utilized or recognized in  
10 medicine.

11           She explained that outside of this litigation, the  
12 only time she's ever really heard the term individualized  
13 assessment is in the context of patients with disabilities, to  
14 assess whether or not they need reasonable accommodations. So  
15 even my client is confused, because as far as she knows, every  
16 time a patient is seeing a provider, they are being assessed,  
17 they are being evaluated.

18           THE COURT: Counsel, you're ignoring the findings that  
19 were made in the March 31 opinion and order. And the findings  
20 specifically say that DOCCS medical providers continue to deny  
21 and discontinue their patients' MWAP medications without  
22 medical justification. There were examples given in the  
23 opinion of discontinuation for none medical reasons. What we  
24 are looking for and what should be abundantly clear from  
25 reading the request for equitable relief is that pain

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1 medications be prescribed or discontinued only for medical  
2 reasons.

3 Is there any reason that you can't figure out how to  
4 write that down? And I'll also point you to Dr. Moores'  
5 declaration, which is summarized at Page 57 of the opinion and  
6 order, where she goes on to talk about some of the actions she  
7 has taken to assure the proper implementation of policy 1.2  
8 4(A). That should be a starting point. Why is it that you  
9 can't write this down?

10 MS. KILEY: Your Honor, our apologies. We certainly  
11 didn't mean any bad faith. We're hoping to engage in  
12 productive discussions with our adversary. But, unfortunately,  
13 it didn't happen that way. We do think there are some terms  
14 that need to be further refined.

15 THE COURT: Why don't you write them down, counsel?  
16 As I recall it, I instructed your side of the table to write  
17 down a proposed order. When are we going to do that? Your  
18 time to appeal is not going to start until we get an order. If  
19 you want to appeal, which I know you do because you've already  
20 filed a notice, you better get the order together. And the  
21 90 days does not start running until we get an order. So how  
22 are we going to do that?

23 MS. KILEY: We can certainly continue a draft and  
24 communicate with our adversary prior to filing another draft  
25 with the Court.

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1 THE COURT: All right. Do you understand that the  
2 relief granted is to extend to all chronic pain patients, not  
3 just the named individuals who you included in Exhibit A to  
4 your May 4 letter? Do you understand that, counsel?

5 MS. KILEY: Respectfully, your Honor, to have the  
6 preliminary injunction apply to the class we think is at odds  
7 with both the PLRA and with 23(b)(2). The PLRA, as we know,  
8 requires that the injunction be narrowly tailored with the  
9 least intrusive means. If my adversary is looking for  
10 individualized assessments of 600-plus patients in 90 days,  
11 that's not -- we don't believe that's realistic or reasonable.

12 THE COURT: I also don't think that's what's being  
13 requested.

14 Could someone from plaintiff's table enlighten us on  
15 that topic?

16 MS. AGNEW: Your Honor, I've had some concerns since  
17 this opinion was issued that what defendants really wanted us  
18 to do was draft the injunction so that they would have further  
19 grounds for appeal. I get it. But what we need, and they  
20 actually ask the Court for, was to put forward a plan pursuant  
21 to the Second Court's holding in *Dean v. Coughlin*. We gave  
22 them this opportunity, and we agree with the Court, this is  
23 incredibly bad faith for a whole host of reasons.

24 I want to circle back to this notion of individualized  
25 assessments. There are actually two moments during our hearing

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1 when Dr. Moores endorsed her definition of individualized  
2 assessments that she had sent via e-mail to her own providers.  
3 We simply ask that she adopt what she has recognized in her own  
4 writing to be an individualized assessment so that it can be  
5 done.

6 And I think the main salient points in that hearing  
7 were, one, that DOCCS hadn't identified the people who were  
8 injured; two, that they hadn't trained providers to stop the  
9 Constitutional violations; and three, that they had come  
10 forward with no plan for implementing individualized  
11 assessments. We certainly don't anticipate that they can get  
12 that done in 90 days, but we need a plan. And we gave them the  
13 ascertainability tools to start to identify those people. And  
14 I think when we get back this thing about the seven putative  
15 class members when I've got a class certified, it's bad faith.

16 We know who these people are. We at least know who  
17 660 of them are. What's the plan? And we don't have a plan.

18 And, in fact, what I will say, I was told by Defendant  
19 Moores' counsel she'd be happy to sign a consent order, but she  
20 doesn't want to pay my fees and costs. And I get that. And  
21 I'll draft the consent order, but we are going to get our fees  
22 and draft orders anyway. The goal right now is to get  
23 injunctions and to get people treated.

24 And as I pointed out to the Court, we had to intervene  
25 just this last week to get medication for Mark Daniels, who sat

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1 on the stand and said he had no medication. He got it, they  
2 transferred him, he got caught off. This has to end, and it  
3 has to move fast.

4 She asked me for three weeks for this, and this is  
5 what we got. I think they get one more than week, we get a  
6 real plan, we get a real plan for identifying people, and for  
7 getting them assessed.

8 MS. KILEY: Your Honor, two things I want to address.  
9 As far as identifying victims of MWAP, the definition that was  
10 recognized -- excuse me. The definition of the injunctive  
11 class that was put forward by plaintiffs that was recognized by  
12 the Court are individuals who are or will be incarcerated, and  
13 individuals who are or will suffer from chronic neuropathies.  
14 Identifying victims of MWAP from the past doesn't fit this  
15 definition. And I don't believe there's been any case law or  
16 authority to put this onus on the defendants to identify who  
17 might be in plaintiff's class.

18 Further, we also know that at the beginning of this  
19 litigation, all of the MWAP request forms were already turned  
20 over to plaintiffs. So they have the information available to  
21 them as far as which patients were denied MWAP medications  
22 during the time period alleged in the second amended complaint.  
23 So as to --

24 THE COURT: And so what?

25 MS. KILEY: And so we don't believe that incorporating



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1 a term that Dr. Moores should go back and identify the victims  
2 of MWAP fits into a preliminary injunction. It would be the  
3 plaintiffs who should identify who's in their class.

4 MS. AGNEW: Your Honor, please. First of all, I can't  
5 use the names in the database because of our HIPAA qualified  
6 protective order. They know that. They asked me to sign it.  
7 I actually drafted it for them. This is actually Dr. Moores'  
8 Constitutional violation to correct. It's not my  
9 Constitutional violation to correct. They know who they are.  
10 They gave me the forms. Start going down the list.

11 MS. KILEY: If I may. The Court in *Walmart* expressly  
12 went into great detail about what (b)(2) actually means. The  
13 (b)(2) class is regarded as having no individual right to a  
14 particular relief independent of any other class member. So to  
15 ask for an injunction to apply to 600-plus patients, who, which  
16 already goes beyond the scope of what the PLRA allows, and to  
17 have them looked into individually, they don't fit into the  
18 PLRA or the (b)(2) class for purposes of a preliminary  
19 injunction.

20 THE COURT: I'm actually not understanding what you're  
21 saying, counsel.

22 MS. KILEY: For the scope of the injunction to be  
23 600-plus goes outside of what the PLRA requires. The PLRA  
24 requires that it be narrow and least intrusive mean "and no  
25 more than necessary."

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1 The (b)(2) class also --

2 THE COURT: I'm not sure that the 600 people is not  
3 exactly that. How are you going to identify the individuals  
4 who need to be looked at to be sure they are getting the pain  
5 medication they need? What's your idea?

6 MS. KILEY: Our idea is that the plaintiffs tell us  
7 who is in their class.

8 THE COURT: It's not their job. It is the job of the  
9 defendants to identify who might be a chronic pain victim to  
10 assess whether those individuals are getting the proper  
11 treatment or not. And then there's the training aspect of it.

12 I thought all of this was pretty clear in the opinion.  
13 And, indeed, Dr. Moores, in her testimony, admitted that there  
14 had been no effort to identify the individuals. She, herself,  
15 as I recall it, undertook some auditing, but that was by no  
16 means a comprehensive review of who might be requiring chronic  
17 pain treatment.

18 MS. KILEY: Your Honor, our reading of the case law is  
19 a certified (b)(2) class is one that challenges a system or  
20 policy of practice, and it's not to evaluate individually the  
21 needs of each class member.

22 THE COURT: The system or practice that is being  
23 challenged here and which was found to exist was the practice  
24 of medical providers discontinuing or failing to prescribe pain  
25 medications for chronic pain victims who needed them. That's

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1 what the practice was. The question is, how are we going to  
2 write the order that requires not only that practice to cease  
3 but requires the review of all of the chronic pain patients to  
4 be sure they are getting the medication that they need.

5 Again, I'll point you back to Dr. Moores' declaration.

6 MS. AGNEW: We can certainly go back and talk to  
7 Dr. Moores to draft additional terms.

8 THE COURT: Why don't you folks go in the jury room  
9 and see what you can come up with? I will give you pads of  
10 paper. I see you have pads of paper. Why don't you go in  
11 there and sit down and take a look and start writing? I think  
12 that's going to be a lot more useful than waiting two weeks and  
13 getting two more pieces of paper.

14 Is there any reason we shouldn't do that?

15 MS. KILEY: No. But, your Honor, at the conclusion of  
16 a discussion, I, of course, have to go back to Dr. Moores.

17 THE COURT: Of course. But you people need to start  
18 writing it down so that you know what is going to happen, and  
19 with great specificity, so that there are no questions about  
20 it. Let's go.

21 Is there anything else you want to talk about before  
22 we break to allow you to write? Anything else?

23 MS. AGNEW: I do think, your Honor, plaintiffs would  
24 like to address a notion of a trial for permanent injunctions.  
25 We don't share defendants' view that we can't motion for that,

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1 especially given the record that was created on the preliminary  
2 injunction. And we would even point out that the cases  
3 defendants cited even say that it is proper when there are no  
4 questions of fact. We don't think there's no question of fact  
5 that they didn't train anyone, they didn't identify anyone, and  
6 they didn't fix the problem.

7 So we want that discussion to be live. I don't read  
8 the PLRA as to be giving them 90 days to fix it and try to moot  
9 our preliminary injunctions. I read the PLRA as not having  
10 temporary relief floating out there that has no buttressing.  
11 So we want to do that, and we want to do it quickly. We think  
12 our clients need it. We especially think our clients need it  
13 in light of this.

14 THE COURT: Why don't you do that while you are  
15 breaking to write. We will get together some dates in about  
16 90 days out, and you put them on your calendar for trial, if  
17 that needs to be done. If it doesn't need to be done, we can  
18 always erase the dates. If, for some reason, you think it has  
19 to be done on papers, then you can do that too. But we'll give  
20 you dates now to put on your calendars.

21 Anything else before you break?

22 MS. KILEY: Just a viewpoint on the --

23 THE COURT: Yes, ma'am.

24 MS. KILEY: Should I address them now or later?

25 THE COURT: Tell me what you want.

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1 MS. KILEY: Okay. Very briefly, your Honor. We think  
2 the substitution of a permanent injunction is very premature  
3 right now. We would ask that the Court give us an opportunity  
4 to show that whatever terms we ultimately put in, that we be  
5 given an opportunity to show we can comply with them. And  
6 additionally, we, if there is a trial date set just in case, we  
7 definitely would like an opportunity to move for summary  
8 judgment before that.

9 THE COURT: I think I said we will put the trial date  
10 down so you have it on your calendars. If you think you can do  
11 it on papers, you're welcome to do that too.

12 MS. KILEY: Okay. Thank you.

13 THE COURT: All right. Thank you. Off the record.

14 (Discussion off the record)

15 (Recess)

16 THE COURT: So what do we have to report?

17 MS. KILEY: Your Honor, we had the opportunity to meet  
18 and confer, and we were able to articulate terms that I'm able  
19 to draft an updated proposed preliminary injunction. Of  
20 course, I do need time to draft it and discuss it with  
21 Dr. Moores. Plaintiff's counsel is willing to work with me in  
22 that process to make sure that the language is appropriate, and  
23 we believe we are able to file an updated draft with the report  
24 next week.

25 THE COURT: Wonderful. Wonderful.

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1           What would you like to do? I can give you three  
2   dates. You can have the week of August 7, you can have  
3   September 5, which is the day after Labor Day, or October 2.  
4   Obviously, the 90 days is going to run, but perhaps you can  
5   confer. Do you want to put down the week of October 7?  
6   Because that's as close as we can probably get to 90 days.

7           MS. AGNEW: We can do August 7.

8           THE COURT: August 7? Forgive me. That's what I  
9   meant, August 7.

10          Put that in your books for trial, and then we can talk  
11   about summary judgment some other time.

12          MS. KILEY: Okay.

13          THE COURT: Before you go making any motions, why  
14   don't we talk about it. Okay?

15          MS. AGNEW: I did suggest to counsel that maybe  
16   pre-motion letters are in order.

17          THE COURT: Yes, indeedy.

18          MS. AGNEW: The normal trigger conversation?

19          THE COURT: The usual.

20          MS. AGNEW: Okay.

21          THE COURT: What else, friends?

22          MS. AGNEW: I think we're good, your Honor.

23          THE COURT: All right. Nice to see you. Thank you.

24          (Adjourned)